

### REMARKS

Applicants respectfully requests reconsideration and allowance of this application in view of the following comments.

Claims 9, 11, 12 and 15 are pending. A Declaration under Rule 132 is provided.

At the outset, Applicants wish to address the showing under 37 C.F.R. § 1.116(b) as to why this amendment is necessary and was not provided earlier. This response is in response to new points raised in the final rejection and at the interview held December 2, 2005. Since this is the first substantive response to the final rejection, this response could not have been presented earlier. Therefore, Applicants respectfully request that the Examiner enter and consider this response.

### Interview

Applicants are grateful for the Examiner's time on December 2, 2005 to discuss the above-referenced application. At the interview, Applicants sought clarification from the Examiner regarding his rejections based on 35 USC 112, first paragraph and 35 USC 103, and the citation of the *In re Kollman* case. More specifically, Applicants contended that synergism was supported by the specification and the Declaration of Dr. Kugler dated April 24, 2002. The Examiner conceded that Applicants showed synergism but there was an issue with the data that showed a narrow range. The Examiner indicated

that there was a question of whether the data was commensurate in scope with the claims. The Examiner suggested that Applicants provide additional data supporting the full range of the claims. No agreement was made as to the patentability of the claims at the interview.

Rejections under 35 U.S.C. 112, first paragraph

The Examiner rejected the claims under 35 U.S.C. 112, first paragraph, for failure to comply with the written description requirement and not being enabled. The Examiner found the specification fails to teach the ratios of components in the Declaration by Dr. Martin Kugler, of record. The Examiner cites *In re Kollman* in the issue section to argue that Examples and unexpected results must be in the specification. In response, Applicants state that it is only an issue section that the Examiner refers to. It is not the holding of the case, just only an issue to consider. Furthermore, the issue section doesn't even state what the Examiner says that it states. The portion of *Kollman* that the Examiner cites says nothing whatsoever about ratios of components in a declaration needing to be in the specification in order for the declaration to be probative. Indeed, nothing in *Kollman* says this. Applicants reiterate that there is no requirement in the law that the specification support unclaimed limitations appearing in a Rule 132 Declaration. The written description requirement, by its very terms, requires that the specification contain a written description of "the invention." It is well settled in the patent law that "the invention" is what is claimed. Consequently, there is no requirement that the specification support these ratios as they are not claimed. Moreover, the claims, which

do not include these ratios, cannot be found to be in violation of the written description requirement because the specification does not support these unclaimed limitations. Likewise, there is no need to enable unclaimed limitations. Thus, for all these reasons, Applicants respectfully request that the Examiner reconsider and withdraw this rejection.

Claim Rejections under 35 U.S.C. 103

Applicants point out that the Examiner conceded a showing of synergism at the interview, but not for the full range of the claims based on the Declaration of Dr. Kugler already of record. At the interview, the Examiner suggested additional data which showed the full scope of the claims. Therefore, Applicants submit a new Declaration dated December 15, 2005 of Dr. Kugler. The new Declaration is provided directly in response to the Examiner's suggestion. The new Declaration provides additional data and comments thereto which show the full range of the claims as requested by the Examiner is reasonably expected to be synergistic. Tests 1 and 2 of the Declaration show that when cyproconazole and propiconazole are combined at different ratios and when cyproconazole and tebuconazole are combined at different ratios, they all achieve a high degree of synergism as indicated by the value of 'X', which in none of the test results are equal to 1, which therefore, shows surprising and unexpected results. Based on the data provided in the newly provided Declaration, a person skilled in the art could ascertain a trend that synergism exists at each ratio tested for the claimed combination. Indeed, in the new Declaration, page 5, Dr. Kugler, an expert in the art, states,

"The foregoing results, in my opinion, provide proof that not only the tested ratios, but *all ratios* of cyproconazole and propiconazole and *all*

*ratios of cyproconazole and tebuconazole would be expected to be synergistic.* As persons skilled in the art know, synergism depends on the components that are mixed, not on the ratios of such components. Accordingly, by showing that cyproconazole and propiconazole and cyproconazole and tebuconazole show synergism at the demonstrated ratios, *we have, in fact, established the expectation that cyproconazole and propiconazole and cyproconazole and tebuconazole will be synergistic at all ratios.* [Emphasis added.]”

Finally, Applicants emphasize that the claims are exactly commensurate in scope with this showing. The instant claims require a “synergistic composition.”

Consequently, only those compositions that are, in fact, synergistic are embraced. If it is not synergistic, then it is not embraced.<sup>5</sup> This wording, coupled with the showing, provides reasonable assurance that the advance extends to all claimed embodiments. Indeed, the advance—disclosure of synergism between these compounds—is exactly claimed—nothing more, nothing less.

In view of the foregoing, Applicants submit that the Examiner would be fully justified to reconsider and to withdraw this rejection. An early notice that this rejection has been reconsidered and withdrawn is, therefore, earnestly solicited.

#### Conclusion

Applicants believe that the foregoing constitutes a bona fide response to all outstanding objections and rejections.

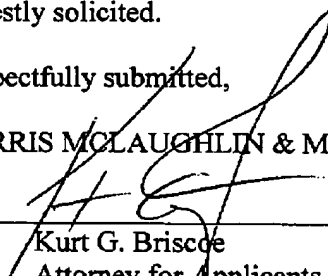
Applicants also believe that this application is in condition for immediate allowance. However, should any issue(s) of a minor nature remain, the Examiner is respectfully requested to telephone the undersigned at telephone number (212) 808-0700 so that the issue(s) might be promptly resolved.

Early and favorable action is earnestly solicited.

Respectfully submitted,

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